71-1412

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

Supreme Court, U. S.
FILED
MAY 1 1972
MICHAEL RODAK, JR., CLERK

FRANK A. EYMAN, Warden
Arizona State Prison,

Petitioner,

-vs-

CHARLES E. HART,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

GARY K. NELSON
The Attorney General
of the State of Arizona

WILLIAM P. DIXON
Assistant Attorney General
159 State Capitol Building
Phoenix, Arizona 85007

Attorneys for Petitioner

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TO: The Chief Justice and the Associate Justices of the Supreme Court of The United States

Your Petitioner, GARY K. NELSON, the Attorney General of the State of Arizona, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, upholding an order of a Federal District Judge, in a habeas corpus proceeding which gives the State the alternatives of: (1) holding the necessary hearings in the State Court for the creation of a reasonable substitute for a trial transcript; (2) granting petitioner a delayed appeal in the State court; (3) releasing him from custody, or (4) setting aside his conviction and retrying him, where at the trial level the court

reporter's notes were lost.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported in ___ F.2d ___ (1972) and is attached hereto as Appendix A.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit of which the State of Arizona seeks review was made in Cause No. 26,347 on March 22, 1972. 28 U.S.C.A. § 1257(3) is relied upon as authority conferring on this Court jurisdiction to review the judgment in question.

QUESTION PRESENTED FOR REVIEW

The issue in this case is of transcendental importance, as it critically involves the proper relationship between Federal and State Courts, and because the practice adopted here by the Federal District judge departs from the traditional practice observed nationwide since Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1963). Put simply that question is:

When a habeas petitioner in Federal District Court alleges a constitutional defect in his state court conviction may the Federal District Court, without a hearing, remand to the state courts with an order that they give the petitioner a hearing on the claim, a new trial, a de-

layed appeal, or release him; or must the Federal District Court hold its own hearing on the merits of the constitutional claim, the state court having given the petitioner a hearing on the issue during trial, but the trial transcript being lost.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendments IX, X and XIV.

STATEMENT OF THE CASE

On November 21, 1968, Charles E. Hart, Petitioner below, (who shall hereinafter be called Hart) filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Arizona, alleging that his April 28, 1961, conviction for first degree murder was secured by a coerced confession. He also alleged that he had been deprived counsel at early stages of the proceedings, and apparently raised the issue of ineffective assistance of counsel. A series of rather protracted Responses, Replies and Orders to Show Cause followed, along with actions in State Court, all designed to produce Hart's trial transcript. Finally, on March 5, 1969, the

Federal District Court ordered the State to produce the transcript. When the transcript was not produced, an Order to Show Cause hearing was held on November 12, 1969. At this hearing, for the first time, it was discovered that the court reporter had lost her notes and the transcript could not be produced. It was then suggested by the Attorney General that Hart be sent back to the State Courts for a delayed appeal to take advantage of the rule providing for reconstitution of the record on appeal when the record is lost. Accordingly, Judge Muecke, on December 19, 1969 deferred further action on the matter until Hart first sought a delayed appeal or a

Norvell v. Illinois, 373 U.S. 420 hearing. Hart so moved the Arizona Supreme Court, but on April 28, 1970, without opinion, that Court denied his motion. The District Court then made the following ruling (Appendix B):

> The petitioner herein, in response to this Court's order of December 19, 1969, having moved for a delayed appeal in the state courts, or in the alternative, sought to obtain a hearing in the state courts in accordance with the procedure announced in Norvell v. Illinois, 373 U.S. 420, 82 S.Ct. 1366 (1963) or sought other appropriate relief; and the Arizona Supreme Court by order dated April 28, 1970 having summarily denied petitioner's motion without any hearing or findings; and petitioner having been denied his right of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in that he

> was granted no hearing of any kind but was dealt with summarily, 28 U.S.C. §2243,
>
> IT IS ORDERED that within 60 days from the date of this order, the state courts grant petitioner a delayed appeal or give him a Norvell v. Illinois, supra, hearing or set aside his conviction and retry him, or petitioner's writ of habeas corpus prayed for shall be granted and petitioner shall be released from custody.

It is from this Order that the State of Arizona appealed to the United States Court of Appeals for the Ninth Circuit. The Circuit Court affirmed the Order of the District Court and issued its mandate. Your petitioner asks that this Court review the decision of the United States Court of Appeals for the Ninth Circuit.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

PETITIONER'S ARGUMENT ON THE QUESTION OF WHETHER THE DISTRICT COURT EXCEEDED ITS POWERS IN ORDERING THE STATE COURTS TO GRANT THE DEFENDANT HART A HEARING OR RELEASE HIM, WHEN IT HAD NEVER HELD ITS OWN HEARING ON THE MERITS OF HIS ALLEGATIONS, AND WHEN THE STATE COURTS HAD PREVIOUSLY DENIED HIS APPLICATION FOR HEARING

The United States Court of Appeals for the Ninth Circuit in its opinion stated: (Appendix A Pg. 12)

> The instant order cannot be characterized as a remand to the state court with an order to conduct a hearing. It is a conditional order providing various alternatives to the state court, including the eventual sanction of release of the prisoner if one of the other alternatives is not complied with. We view the order as a proper exercise of federal jurisdiction and power in the field of habeas corpus.

Arizona's position is that the District Court exceeded its role under proper federal-state relations and abused its discretion when ordering the State Courts to hold the evidentiary hearing.

Hart commenced his action in Federal Court on November 21, 1968 after having attempted habeas corpus in the Superior Court, the Court of Appeals and the Supreme Court of the State of Arizona. Thereafter, in what can only be described as a rather incredible series of delays, the State attempted to meet all of Hart's allegations, but in the process failed to produce and deliver to the Federal District Court a transcript

of Hart's trial. Only when the matter came before the District Court on November 12, 1969, on an Order to Show Cause why Petitioner should not be released for the State's failure to supply the transcript, did the State discover and report that the transcript was lost and unavailable. At this hearing, too, it was suggested to the Court by the Attorney General that, even at this late date, the matter should be presented to the Arizona Supreme Court for a delayed appeal so that the missing record could be supplied under the existing rules. When the District Court accepted this suggestion and ordered the Petition held in abeyance until

the Motion for Delayed Appeal had been presented to the Arizona Supreme Court, it was the feeling of everyone concerned that the motion would be granted without question. But the Arizona Supreme Court denied the Motion for Delayed Appeal without opinion and the District Court issued the Order now appealed. The Denial of the Motion for Delayed Appeal might indeed have been the last straw on judicial patience in this case, but there is nothing in this record, in the pleadings or in the arguments, to suggest that the action was in any way invidious or discriminatory. In the absence of such, the District Court's Order exceeded its powers.

The Petitioner concedes the power of the Federal District Court to order that the Defendant be released unless the State retry him, but only after that Court has held an evidentiary hearing at which it has been determined that the constitutional rights of the Defendant have been violated. In this case there has been no such hearing. All that was before the District Court when it entered its Order were the Petitioner's bare allegations and the refusal of the Arizona Supreme Court to grant a delayed appeal thereon. For the Order to stand, we must find in the Federal District Court the power to remand an issue to the State Courts

and to compel compliance with its directions in any specific case. The District Court's Order, calling for release of the Petitioner if his conditions were not met, is nothing more than a remand with directions. Such an action is not countenanced by the law.

Due regard for the rightful independence of State governments, which actuates Federal Courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. Matthews v. Rodgers, 284 U.S. 52 , 76 L.Ed. 447, 52 S.Ct. 217. There is nothing in the habeas corpus statute which grants to the Federal

District Courts the power of remand. In a recent case where the State Court record was confusing and incomplete, the United States Court of Appeals for the Ninth Circuit said:

> Accordingly, we conclude that an evidentiary hearing must be conducted.
>
> On remand the District Court may consider it appropriate to hold the Petition in abeyance in order that the California Courts may, within a reasonable time, conduct the necessary hearing and first make the critical determinations bearing upon the serious constitutional issue which is apparent. Bryan v. Polk, 416 F.2d. 21, 22, (9th Cir., 1969).

Prominent by its absence is any hint that the District Court has the power to order the State Court hearing, or to release the prisoner

for failure of the State Court to act.

If a Federal District Court may, without a hearing on the merits, order the State Courts to reconsider their previous actions on a particular application for relief, then the Federal District Courts are, as pointed out, exercising the same function as an Appellate Court under a writ of error or on an appeal. Such cannot be done. A Habeas Corpus Petition cannot be employed as a substitute for a writ of error. McCrea v. Jackson, 148 F.2d 193 (6th Cir. 1945), and cases cited therein, Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969.

Urquhart v. Brown, 205 U.S. 179, 27 S.Ct. 459, 51 L.Ed. 760, Woolsey v. Best, 299 U.S. 1, 57 S.Ct. 2, 81 L.Ed. 3. Or, as stated in Daniels v. Allen, 192 F.2d 763, 766:

> It is well settled that the Writ of Habeas Corpus may not be used in lieu of an appeal to review the action of a trial court with respect to the questions there raised and passed upon. (See cases cited therein).

The case of Townsend v. Sain, supra is determinative of the issue where this court held:

> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is

> not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.
> (372 U.S. at 313)

This made it mandatory that the federal court hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in the state court.

> In other words a federal evidentiary hearing is required unless the state-court trier of fact after a

> full hearing reliably found the relevant facts. (372 U.S. at 312, 313).

In the footnote referring to the above statement this Court said:

> In announcing this test we do not mean to imply that the state courts are required to hold hearings and make findings which satisfy this standard, because such hearings are governed to a large extent by state law.

This Court in Townsend explicitly considered the situation where "no record could be obtained," 372 U.S. at 319, as is the case here.

> Of course, if because no record can be obtained the district judge has no way of determining whether a full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must hold one.

In Allen v. Perini, 424 F.2d 134, (6th Cir.) certiorari denied, 400 U.S. 906 (1970) the court in deciding the question whether a writ of habeas corpus could issue on a default judgment for respondent's failure to file a timely return to the district court's show cause order held that the district court did not have the power to grant the writ in the absence of an evidentiary hearing and unless and until the averments of the petition were proved by competent evidence. The holding was based on the Court's reading of Townsend, and on the language of 28 U.S.C. §2241 (C) (3) and 2243.

The burden to show that he is in custody in violation of the Consititution of the United States is on the prisoner. Jones v. Russell, 396 F.2d 797 (6th Cir.); Gray v. Johnson, 354 F.2d 986 (6th Cir.). The failure of State officials to file a timely return does not relieve the prisoner of his burden of proof. Default judgments in habeas corpus proceedings are not available as a procedure to empty State prisons without evidentiary hearings. We conclude that the failure of the Office of the Attorney General of Ohio to file a timely return does not afford a basis for instanter relief. Despite the delinquency of the State, the District Court was obligated to decide the case on its merits. McGuffey v. Turner, 267 F.Supp. 136 (D. Utah); cf. Taylor v. United States, 282 F.2d 16, 23-24 (8th Cir.). We conclude that in spite of the untimeliness of the State's return, the District Court would have no power to grant the writ of habeas corpus in

> the absence of an evidentiary hearing and unless and until the averments of the petition have been proved by competent evidence.
> (424 F.2d at 138).

Reiterating the fact that the State does not deny the District Court's power to hold an evidentiary hearing on the issues raised by Hart's allegations, Petitioner contests its power to order the defendant released unless the State Courts hold a hearing which complies with its requirements. Perhaps the issue is best summarized by the following from Townsend:

> In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's

> constitutional claim. There is every reason to be confident that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, will not abuse that discretion. (372 U.S. at 318).

Had the District Court granted Hart a proper evidentiary hearing upon his claims, the Petitioner would not now be petitioning this Court. In ordering the State Courts to hold the hearing, the District Court below exceeded its role under "proper federal-state relations" and abused its discretion.

CONCLUSION

It is respectfully submitted that this Court should take jurisdiction for the purpose of determining whether the Federal District Court for the District of Arizona exceeded its powers by ordering the Courts of the State of Arizona to hold an evidentiary hearing or a retrial or in the alternative release the defendant.

Respectfully submitted,

GARY K. NELSON
The Attorney General
of The State of Arizona

/s/ William P. Dixon

WILLIAM P. DIXON
Assistant Attorney General

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

WILLIAM P. DIXON, being first duly sworn upon oath, deposes and says:

That he served the attorney for Respondent in the foregoing case by forwarding two (2) exact copies of Petition for Writ of Certiorari in a sealed envelope, first class postage prepaid, and deposited same in the United States mail addressed to:

RICHARD A. MILLER
PHILIP F. SCHNEIDER, Jr.
Fennemore, Craig, von Ammon & Udall
900 First National Bank Building
Phoenix, Arizona 85004

this 19th day of April, 1972.

William P. Dixon

Subscribed and sworn to before me this 19th day of April, 1972.

E. Louise Long

My commission expires:

OCT 24 1973

A P P E N D I X "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES E. HART,

Petitioner-Appellee,

-vs-

FRANK EYMAN, Warden, Arizona State Prison, State of Arizona, et al.,

Respondents-Appellants,

No. 26,347

[March 22, 1972]

On Petition for Review of the Decision of the United States District Court of the District of Arizona

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Before: HUFSTEDLER and TRASK, Circuit Judges, and HILL*, District Judge:

In this opinion, we consider the extent of the obligation of a state to provide to an incarcerated prisoner who

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*Honorable Irving Hill, United States District Judge for the Central District of California, sitting by designation.

has filed a habeas corpus petition in the federal court a reasonable substitute for the transcript of his trial when the court reporter's notes are lost. And we also consider the propriety of an order of a federal district judge in such a case which gives the state the alternatives of (1) holding the necessary hearings in the state court for the creation of a reasonable substitute for a trial transcript, (2) granting petitioner a delayed appeal in the state court, (3) releasing him from custody, or (4) setting aside his conviction and re-trying him.

Hart, the petitioner herein, was convicted of murder in an Arizona state court in 1961 and sentenced to life imprisonment. At his trial, he was represented by court-appointed counsel. No appeal was ever perfected because, according to Hart, he was transferred to state prison immediately upon being sentenced where he "did not know how to start an appeal" and was without counsel or law books. In 1966, Hart made his first application for post-conviction relief, an application for habeas corpus filed in the Superior Court of Pinal County, Arizona, in which his trial was held. Thereafter, habeas corpus petitions were filed in the Arizona Court of Appeals and in the Arizona Supreme Court. All were denied without a hearing and with-

out opinion.[1] The District Court held that these various applications to the state courts constituted an exhaustion of state remedies. Before seeking the aid of the federal courts petitioner in June, 1967 filed a motion in the state trial court to obtain a copy of his trial transcript. His motion was immediately denied.

After this history the instant petition for habeas corpus was filed in the federal District Court in November 1968. The filing was in pro per and in forma pauperis, as was the case in his state petitions. The principal ground asserted for relief is the introduction against petitioner of a confession which was alleged to have been obtained by coercion, fraud and threats. The District Court appointed counsel for petitioner who has served throughout without fee.

On motion of petitioner's counsel, the District Court on March 5, 1969, ordered the state to produce a transcript of the petitioner's trial for use by the petitioner and his counsel (R. 253). For some reason, the Arizona Attorney General, despite this unequivocal order from the federal court for the production of a transcript, felt it necessary to move in the Arizona Supreme Court for an order

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[1]There is a brief statement filed by the Arizona Court of Appeals but it does not deal at all with the point at issue in the present case, an allegedly coerced confession.

of that court directing that a reporter's transcript be produced and provided to petitioner by the Arizona trial court.[2] Such a motion was filed March 16, 1969 (R. 276) and was immediately denied by the Arizona Supreme Court on the ground that it had no jurisdiction to order the Arizona trial court to furnish a transcript for the purpose of fulfilling the federal court order (R. 278). Petitioner informed the federal court of Arizona's refusal to provide the reporter's transcript and was permitted to add to his federal habeas petition, as an additional ground for relief, the state's refusal to provide the transcript.

On August 7, 1969, the District Court entered an order granting the writ of habeas corpus unless a reporter's transcript was produced within ninety days from that date or good cause was shown why the transcript could not be made available within said period (R. 310). The ninety-day period apparently expired without any transcript being furnished and the District Court apparently entered an order on November 6, 1969, for release

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[2] The only possible explanation for this delaying maneuver, hinted at in the record, was the Attorney General's concern that the reporter could not be paid for the transcript without such an order. R.T. 11/12/69, p. 19.

of petitioner although a copy of that order does not appear in the Clerk's transcript furnished to us. On November 7, 1969, Arizona moved in the District Court for a temporary stay of the order of release, alleging that the court reporter had been under a "misunderstanding" concerning the preparation of the transcripts which had now been straightened out and that the transcript would "be prepared forthwith." A temporary stay of the release order was granted and a hearing was noticed for November 12, 1969, in the federal court. On that date, for the first time, the State Attorney General revealed to the petitioner and to the federal court that the reporter's notes were lost.[3]

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[3]The reporter's testimony illustrates a laxity and lack of system and security governing the storage of court reporters' notes which, it seems to us, is generally prevalent throughout the American court system. See as examples: United States v. Pate, 318 F.2d 559, 561 (7th Cir. 1963); Carden v. Henderson 284 F.Supp. 1009, 1011 (E.D.Tenn. 1967); Rambo v. Rambo, 84 C.A.2d 632, 634 (1948); Duarte v. Rivers, 90 C.A.2d 152, 155 (1949); Lilienthal v. Hastings Clothing Co., 123 C.A.2d 91, 92 (1954). The reporter testified that some reporters' notes in her county are stored at seven different places, i.e., the County Hospital, the

At the hearing on November 12, 1969, the Arizona Attorney General conceded (R.T. 22) that Arizona has an established substitute procedure (in the nature of an agreed statement of facts prepared by the attorneys, judge and other interested parties after a hearing) for use when a reporter's transcript cannot be produced. But he informed the District Court that under Arizona procedure this could not be made available to petitioner except in connection with a delayed appeal in the Arizona Supreme Court and petitioner had never sought a delayed appeal therein.

In an obvious effort to accommodate the state, the district judge followed the suggestion of the Arizona Attorney General and by order of December 19, 1969, deferred further action until petitioner could file in the Arizona courts his motion for a delayed appeal and for a hearing (which the district judge called a "Norvell v. Illinois" hearing) for the creation of a transcript substitute. The petitioner followed the district judge's suggestion and made the

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basement of the new courthouse building, the boiler room of the old courthouse building, the Adult Probation office storage area, the old jail (two floors thereof), the storage warehouse at Fifth and Jefferson and the court reporters' official storage area (Rep.Tr. 11/12/69, p. 5).

appropriate motion for delayed appeal in the Arizona Supreme Court. His counsel apprised that court of the District Court's order of December 19, 1969.. But the Arizona Supreme Court, to the obvious embarrassment of the Arizona Attorney General, denied the motion without a hearing.

This led to the District Court's order filed June 8, 1970, the order appealed from herein. That order came almost three years after petitioner's first formal effort to obtain a reporter's trial transcript, almost two years after his habeas corpus petition was first filed in the federal court and fifteen months after the District Court's first order for the production of a reporter's transcript. In the order appealed from (R.353), the District Court gave the respondent Warden and the State of Arizona four alternatives, one of which was to be exercised within sixty days from the date of the order. As stated above, the specified alternatives as to the petitioner are: release him, grant him a delayed appeal by the state courts (which, under state procedure, would apparently automatically result in the preparation of a transcript substitute), afford him a "Norvell v. Illinois" hearing (another method whereby the federal court would have a transcript substitute upon which to act), or set aside his conviction and re-try him.

Arizona challenges this Order as being beyond the power of the District Court. In effect, Arizona contends that if the District Judge desires to have a transcript substitute prepared, he should himself hold the hearing necessary for its preparation and he cannot order the state courts to hold such a hearing, either directly or as an alternative to the granting of a writ of habeas corpus and release of petitioner.

The substantive law and the procedural requirements for criminal trials involving allegedly coerced confessions have now been well established. The landmark cases were decided after this petitioner's trial but the requirements are retroactive. When the state seeks to use a confession which the defendant claims was coerced, a hearing outside the presence of the jury must be held as to the circumstances surrounding the confession and the trial judge must make a preliminary finding of voluntariness and non-coercion. Jackson v. Denno, 378 U.S. 368 (1964). Thereafter, if such a finding is made, the same testimony of the surrounding circumstances and the confession may be presented to the jury which must be instructed that it should determine the voluntariness of the confession and should disregard it unless they find voluntariness and non-coercion. As stated, these rules of law are retroactive. Glidden v. Unsworth, 396 F.2d 373,376 (9th Cir. 1968).

Even if the voluntariness issue was properly presented to the jury, if the record does not make it clear that the trial judge made the required preliminary determination, a federal court acting on a habeas corpus petition, must return the case to the state courts with an order for release of the petitioner unless such a finding by the judge is presently made. Boles v. Stevenson, 379 U.S. 43 (1964).

In the instant case, the clerk's transcript indicates that there were some proceedings outside the presence of the jury concerning voluntariness of the confession (R. 54, 55) and that the question of voluntariness was apparently submitted to the jury under what appears to have been a proper instruction.[4] But what is not revealed by the clerk's transcript is whether the trial judge made the preliminary finding of voluntariness required by cases cited above. That can only be determined by a reporter's transcript or a transcript substitute. Until what transpired in the trial court and what finding, if any, the trial judge made, is shown by means of a reporter's transcript or a transcript substitute, the federal court is unable to perform its proper function and unable

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[4]See handwritten Instruction No. 9, transmitted to this Court by letter from the Arizona Attorney General dated September 2, 1971.

to decide the case pending before it. Under the facts of this case, the burden of producing the necessary record to enable the federal court to decide the case is clearly on the state.

Arizona characterizes the trial court's order as "nothing more than a remand with directions."[5] It urges that under proper standards of federalism and prompted by considerations of mutual respect of state and federal courts for the dignity and independence of each other, the order in question should be held to be beyond the power of a federal court.

We find no basis for declaring the trial court's order to be one which violates principles of good federalism or is beyond its power. There are ample precedents in habeas corpus situations for the issuance of an alternative form of order by a federal court whereby the state is given various alternatives which include release of the petitioner as one of the alternatives or which provide for release of the petitioner if none of the

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[5] In Carter v. Eyman, 265 F.Supp. 957 (D.Ariz. 1967), a different federal judge in haec verba "remanded" a case involving a similar question of coerced confession to the Arizona Superior Court. The order was apparently not appealed and was accepted and acted upon by the Arizona courts. See Carter v. Eyman, 281 F.Supp. 776 (D. Ariz. 1968).

alternatives is met. In Boles v. Stevenson, 379 U.S. 43 (1964), a District Court had ordered release of the habeas petitioner unless the state court re-tried him within a reasonable time. The order was affirmed by the Supreme Court with the addition of another alternative to release of the petitioner, namely, a hearing in the state court as to whether the trial judge had made the necessary preliminary determination of the voluntariness of a confession under Jackson v. Denno. In Gladden v. Unsworth, supra, this court, in disposing of the habeas petition, issued an alternative form of order much like the one in question here. This court's order provided that within a reasonable time the state court should either grant a new trial or conduct a present evidentiary hearing concerning the voluntariness of the confession at issue. The order went on to provide that if the state court did not undertake one of those alternatives within the time specified, the petitioner should be released. In Townsend v. Sain, 372 U.S. 293 (1963), a case heavily relied on herein by Arizona on another point, the Supreme Court affirmed a District Court order granting release of a habeas petitioner unless the state court granted him a new trial forthwith. 372 U.S. at 316.

Chessman v. Teets, 354 U.S. 156 (1957), is perhaps the most interesting precedent

of all. There, the reporter at the state court trial had died after transcribing a small portion of the trial and there was great difficulty in reading his notes. The state court undertook a procedure for the creation by others of a purported transcript. The defendant was not represented during that procedure and challenged the accuracy of the purported transcript. After exhausting his state remedies, he applied to the federal court for a writ of habeas corpus. The Supreme Court held that the state court procedure in creating the purported transcript lacked the requirements of due process and remanded the case to the District Court with instructions to enter an order as prescribed by the Supreme Court in its opinion. The prescribed order permitted the state courts a reasonable time within which to comply with constitutional requirements in connection with the transcript, and, failing such action, ordered that the petitioner be discharged. 354 U.S. at 166.

The instant order cannot be characterized as a remand to the state court with an order to conduct a hearing. It is a conditional order providing various alternatives to the state court, including the eventual sanction of release of the prisoner if one of the other alternatives is not complied with. We view the order as a proper exercise of federal jurisdiction and power in the field of habeas corpus.

Arizona apparently argues that even if the instant order lies within the jurisdiction and power of the District Court, it should be reversed under the teaching of Townsend v. Sain, supra. Arizona particularly relies upon the following language:

"Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words, a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

> . . . Of course, if because no record can be obtained the district judge has no way of determining whether a full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must hold one.
> 372 U.S. at 313 and 319.

We think Arizona misreads Townsend v. Sain and the above quoted language. Townsend concerned itself with the question of when the federal court must conduct its own evidentiary hearing on factual matters and when it may forego such a factual hearing of its own on the ground

that there has been a proper factual hearing, meeting federal constitutional requirements, in the state court proceedings. We believe that the language in question was meant only to emphasize that where it cannot be determined from the record of the state court proceedings that a factual hearing there met all of the standards and requirements enunciated in Townsend, the federal court has no alternative but to conduct its own factual hearing.

The type of a hearing which is required to create a transcript substitute is not the type of factual hearing dealt with in Townsend. The hearing necessary to create a transcript substitute is one to determine what actually occurred at the state court trial. Under the facts of the instant case, the federal court is entitled to require the state court to take the steps necessary to inform the federal court as to what occurred at the trial on penaly (sic) of releasing or re-trying the petitioner.

Although the instant order is not a direct order to the state to conduct the hearing necessary for the creation of a transcript substitute, even if it were construed to be a direct order, it might well be valid. Such a holding would be a natural and logical extension of the principle enunciated by the Supreme Court in Young v. Ragen, 337 U.S. 235 (1949). In that case, the Court held that every state was required to provide

some clearly defined method by which state prisoners could raise, within the structure of the state courts, their claims of denial of federal rights. In the instant case, it cannot be determined whether petitioner has been afforded his constitutional right to a preliminary judicial determination of the voluntariness of his confession unless and until a reporter's transcript or a substitute therefor is provided. We think the obligation of providing one or the other devolves upon the state and the state alone. Until it is fulfilled, there is no way for the state court initially, and thereafter the federal court, to determine if petitioner's federal constitutional rights were infringed.

Underlying this entire appeal and the events which preceded it, we detect a note of conflict and asperity in the relationships between the state and federal courts in Arizona. It seems incomprehensible to us that on this record the state can legitimately attack the acts and orders of the trial judge herein as an affront to the dignity and independence of its courts. To the contrary, throughout the long history of this matter the federal District judge appears to have abstained from acting, temporized his acts, and stayed their effect, so as to give the state every possible opportunity to afford the petitioner his undoubted constitutional rights without intervention of the fed-

eral courts. If the state had acted to provide a reporter's transcript when one was first requested, or even when first ordered to do so, the reporter's notes might then have been available. The facts of this case illustrate the wisdom of Mr. Justice Brennan's statement in his concurring opinion in Case v. Nebraska, 381 U.S. 336 (1965), in which he said:

> None can view with satisfaction the channeling of a large part of state criminal business to federal trial courts. If adequate state procedures, presently all too scarce, were generally adopted, much would be done to remove the irritant of participation by federal district courts in state criminal procedure.
> 381 U.S. at 345, 346.

Arizona has delayed much too long in doing what it should do and is obligated to do in connection with the instant habeas corpus proceeding. The order of the District Court is affirmed. The mandate will issue now. The sixty-day period referred to in the District Court's order shall commence to run with the date of the filing of this opinion.

TRASK, Circuit Judge, dissenting:

I respectfully dissent from the opinion of the majority in this case.

Petitioner's original application for a writ of habeas corpus asserted as ground for release, the introduction against him in his state criminal trial for murder a confession which was alleged to have been obtained by coercion, fraud and threats. The district court ordered the respondent to produce a transcript of petitioner's trial, but the State Attorney General was unable to do so because the court reporter's notes were lost. The district judge then deferred action on the petition until petitioner could file in the Arizona state court a motion for a delayed appeal and hearing to create a transcript substitute. Petitioner's appropriate motion before the Arizona Supreme Court was denied without a hearing. The district court then filed the order the propriety of which is in question in this appeal. That order gave the State four alternatives: (1) hold the necessary hearing to create a substitute transcript; (2) grant petitioner a delayed appeal in the process of which a substitute transcript would be created; (3) release petitioner from custody; or (4) set aside petitioner's conviction and retry him.

The vice I find in the district court's order is the alternative which requires the state to release the prisoner if none of the other alternatives is elected. The state has already denied a petition for a delayed appeal. It has indicated by its denial of applications for habeas corpus (three in number) that correctly

or incorrectly it has determined that the conviction was in all respects according to law and that it was not in violation of the Constitution and laws of the United States or of the State of Arizona. It has also indicated rather clearly that it intends to take no further action. The remaining alternative is release.

The present petition was one addressed to the District Court of the United States. That court has jurisdiction

> [t]o entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> 28 U.S.C. § 2254(a).

However,

> The writ of habeas corpus shall not extend to a prisoner unless
>
> * * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . .
>
> 28 U.S.C. § 2241(c)(3).

The district court's order states that

> petitioner [has] been denied his right of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in that he was granted no hearing of any kind [by the Arizona Supreme Court] but was dealt with summarily, . . .
>
> 28 U.S.C. § 2243

The district court cites no relevant authority for its determination,[1] and adduced no evidence at its hearing which supports that finding. Likewise, the majority opinion tells us that "[u]nder the facts of this case, the burden of producing the necessary record to enable the federal court to decide the case is clearly on the state." Again no cita-

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[1] 28 U.S.C. § 2243 sets out the procedures to be followed by the federal court upon receipt of a petition for writ of habeas corpus. It has nothing to do with the constitutionality of the Arizona Supreme Court's denial of petitioner's motion for delayed appeal. In fact, by failing to hold a hearing directed to the issue whether petitioner was being held in violation of his constitutional rights by this action of the Arizona Supreme Court, the district court failed to follow the mandate of 28 U.S.C. § 2243.

tions are made to support this assertion.

Ariz.Sup.Ct.(Crim.) R.16(a) provides that a defendant in a criminal action who has failed to take an appeal within the statutory sixty-day period may apply to the court for an order permitting him to take a delayed appeal, if the failure to appeal has been without fault on his part.[2] The Arizona Supreme Court denied petitioner's motion under this Rule.

A writ of habeas corpus may not be granted just because the state court declines to hold a hearing which would result in the creation of a substitute transcript. That failure is not, per se, a violation of petitioner's constitutional rights. The judgment of the Arizona Supreme Court carries with it a presumption of regularity, Johnson v. Zerbst, 304 U.S. 458, 468 (1938), and mere allegations in the habeas petition are insufficient to

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[2] 16(a) Motion to Take Delayed Appeal. A defendant who has, without fault on his part, failed to take an appeal within the sixty day period prescribed by Rule 348 of the Rules of Criminal Procedure may, by written motion supported by affidavit, apply to this court for an order permitting him to take a delayed appeal. The clerk shall forthwith notify the attorney general who shall respond to such motion within five days.

justify the grant of the writ, United States v. Deegan, 279 F.Supp. 53, 59 (1967). The burden of proof is upon the petitioner to establish his claim. Johnson v. Zerbst, supra; Williams v. Smith, 434 F.2d 592 (5th Cir. 1970); Allen v. Perini, 434 F.2d 134 (6th Cir.), cert. denied, 400 U.S. 906 (1970). To this end, the district court must "hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243.

The Supreme Court, in Townsend v. Sain, 372 U.S. 293 (1963), dealt with the right to a plenary hearing in federal habeas corpus, and set down six instances when the district court would be required to hold such hearings.

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.
>
> Id at 313.

Stated summarily, "a federal evidentiary hearing is required unless the state - court trier of fact [either at the time of the trial of in a collateral proceeding] has after full hearing reliably found the relevant facts. Id. at 312-313. This duty of the district court derives from the purpose of federal habeas corpus, to remedy "detentions of fundamental illegality" by providing a "trial-type proceeding" by way of an "original civil proceeding." Id. at 311. The Court further stated:

> State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution.
>
> Id. at 312.

In discussing the "proper application" of the tests it outlined, the Court considered the indispensibility of a complete state record in determining whether a writ of habeas corpus should issue.

> A District Court sitting in habeas corpus clearly has the power to compel production of the complete state record. Ordinarily such a record---including the transcript of the

> testimony (or if unavailable some adequate substitute, such as a narrative record), the pleadings, court opinions, and other pertinent documents--is indispensible to determining whether the habeas applicant received a full and fair state court evidentiary hearing resulting in reliable findings. (citation omitted). Of course, if because no record can be obtained the district judge has no way of determining whether a full and fair hearing which resulted in findings of relevant fact was vouchsafed, he must hold one. So also, there may be cases in which it is more convenient for the district judge to hold an evidentiary hearing forthwith rather than compel production of the record. It is clear that he has power to do so.
>
> 372 U.S. at 319
> (Emphasis added).

Under the rationale and indeed the literal language of Townsend, the district judge in this case had a duty to hold an evidentiary hearing, to make relevant findings of fact on petitioner's claim that the admission of his confession during his criminal trial violated the Fourteenth Amendment, before ordering the

petitioner's release, conditionally or otherwise. Because the district court was unable to obtain a record, it had to hold a full factual hearing. To release the prisoner without doing so would be in derogation of the principle that state prisoners are entitled to relief only when they have proved their detentions are constitutionally infirm.

The majority attempts to distinguish Townsend as applicable only when the federal district court has the record of the state court proceeding before it and cannot determine from that record whether there has been a full and fair hearing resulting in supported findings of fact. But, as pointed out above, the Court in Townsend explicitly considered the situation where "no record can be obtained," 372 U.S. at 319, as was the case here. "[I]f . . . no record can be obtained[,] the district judge . . . must hold [an evidentiary hearing]. Id. The majority's reading of Townsend narrows the case's application to its own facts, while the Court expressly stated its intention to establish an "open-ended" categorization, because "we cannot here anticipate all the situations wherein a hearing is demanded." Id. at 317.

Under Townsend, then, the duty to create a record sufficient to enable the federal district court to decide whether the writ of habeas corpus should issue devolves not only upon the state courts, as the majority asserts, but upon the

federal district court as well. Without holding such an evidentiary hearing, the district judge did not have power to order the release of the petitioner. He has not determined that the prisoner is being held in derogation of his federal constitutional rights.

I find additional support for my reading of Townsend in Allen v. Perini, 424 F.2d 134 (6th Cir.), cert. denied, 400 U.S. 906 (1970). In that case, the court discussed the question whether a writ of habeas corpus could issue on a default judgment for respondent's failure to file a timely return to the district court's show cause order. The court held that the district court did not have the power to grant the writ in the absence of an evidentiary hearing and unless and until the averments of the petition were proved by competent evidence. This holding was based on the court's reading of Townsend, and on the language of 28 U.S.C. §§ 2241(c)(3) and 2243.

> The burden to show that he is in custody in violation of the Constitution of the United States is on the prisoner. Jones v. Russell, 396 F.2d 797 (6th Cir.); Gray v. Johnson, 354 F.2d 936 (6th Cir.). The failure of State officials to file a timely return does not relieve the prisoner of his burden of proof. Default

> judgments in habeas corpus proceedings are not available as a procedure to empty State prisons without evidentiary hearings. We conclude that the failure of the Office of the Attorney General of Ohio to file a timely return does not afford a basis for instanter relief. Despite the delinquency of the State, the District Court was obligated to decide the case on its merits. McGuffey v. Turner, 267 F.Supp 136 (D. Utah); cf. Taylor v. United States, 282 F.2d 16, 23-24 (8th Cir.). We conclude that in spite of the untimeliness of the State's return, the District Court would have no power to grant the writ of habeas corpus in the absence of an evidentiary hearing and unless and until the averments of the petition have been proved by competent evidence.
>
> 424 F.2d at 138.

The majority attempt to support the order of the district court as a conditional order. Conditional releases are within the power of the district court to fashion an appropriate remedy "as law

and justice require." 28 U.S.C. § 2243. In Rogers v. Richmond, 365 U.S. 534 (1961), Justice Frankfurter discussed the rationale behind conditional orders. After determining that the trial judge in petitioner's trial for murder had not applied the proper constitutional standard in determining that petitioner's confession was voluntary and admissible, the Court remanded the case to be held to give the state an opportunity to retry the petitioner within a reasonable time; in default thereof, the petitioner was to be discharged.

> The District Court might conceivably hold a hearing de novo on the issue of coercion. But such a procedure would neither adequately protect the federal rights of state criminal defendants nor duly take account of the large leeway which must be left to the States in their administration of their own criminal justice.
>
> 365 U.S. at 547.

Justice Frankfurter's concern in Rogers is that the federal courts respect the constitutional institution of federalism which affords the states the right to fashion appropriate procedures for the vinidication of federal rights. Furthermore, the conditional order of release was predicated on a correct initial determinati

by the district court that the petitioner was in fact being held in derogation of his constitutional rights because the trial judge had not applied the proper constitutional standard to determine the admissibility of his confession. In the case before us, the district judge has made no prior determination that petitioner's confession was improperly admitted, nor could he have done so without carefully scrutinizing the record of the criminal trial, a substitute record thereof, or holding an evidentiary hearing. Townsend v. Sain, 372 U.S. 293 (1963); United States ex rel. Jennings v. Ragen, 358 U.S. 276 (1959); Connor v. Wingo, 409 F.2d 21 (6th Cir. 1969); Maes v. Patterson, 401 F.2d 200 (10th Cir. 1968); Thompson v. White, 391 F.2d 724 (5th Cir. 1968); Dentis v. Oklahoma, 376 F.2d 590 (10th Cir. 1967), cert. denied, 393 U.S. 927 (1968); Elsperman v. Wainwright, 358 F.2d 259 (5th Cir. 1966).

The "conditional order" cases cited by the majority likewise involved preliminary determinations that petitioner was being held in violation of his constitutional rights. Boles v. Stevenson, 379 U.S. 43 (1964)(state procedures to determine voluntariness of confession not constitutionally adequate); Gladden v. Unsworth, 396 F.2d 373 (9th Cir. 1968) (constitutionally required procedure to determine voluntariness of confession

not complied with).[3] Since the federal district court below made no independent and preliminary determination that petitioner's constitutional rights had been violated by the admission of his confession, the cases sanctioning conditional order of release after a federal court hearing are inapposite and do not support the majority's conclusion that the district court's order was proper. Chessman v. Teets, 354 U.S. 156 (1957), attracts the attention of the majority as "the most interesting precedent of all." From a public and historic standpoint it may be, but the case falls repetitively within the category of "conditional order" cases already discussed. The Supreme Court held that petitioner had been denied procedural due process because neither he nor his attorney was permitted to be present

---

[3]Accord, Pate v. Robinson, 383 U.S. 375 (1966)(failure of state trial court to inquire into competency to stand trial violated right to fair trial); Jackson v. Denno, 378 U.S. 368 (1964)(state procedure to determine voluntariness of confession unconstitutional); Dowd v. United States ex rel. Cook, 340 U.S. 206 (1951) (unconstitutional denial of right to appeal); Bosler v. Swenson, 363 F.2d 154 (8th Cir. 1966), aff'd, 386 U.S. 258 (1967)(state procedure for provision of counsel for indigent criminal defendants on appeal unconstitutional).

during the proceedings to create a substitute transcript. The Court directed the district court to enter a conditional order, allowing the State a reasonable time within which to hold adversary proceedings to determine the accuracy of the transcript, failing which the petitioner was to be discharged. This order was based upon the proper preliminary determination that petitioner was being held in violation of the Constitution. In our case, there has been no such determination. Furthermore, California law provided for an automatic appeal in Chessman's case, and required that the entire record of the action be prepared. Id. at 158. Given this California rule, procedural due process would of course require that the transcript be accurate and that defendant participate in person or by counsel at hearings to reconstruct the record of his trial. There is no Arizona statute by which an appeal is automatically taken, nor did Hart appeal his conviction within sixty days, as required by Ariz. R. Crim. P. 346(A). There is no rule in Arizona which required the state court in Hart's case to prepare an entire record.

The majority also attempts to support the propriety of the order as a "direct order" under the rationale of Young v. Ragen, 337 U.S. 235 (1949). In that case, petitioner had filed for a writ of habeas corpus in the state sentencing court raising "substantial questions under the due

process clause." 337 U.S. at 237. His petition was denied without a hearing. At that time, under Illinois law, habeas corpus was not an appropriate remedy for denials of due process. However, since then the Illinois Supreme Court had handed down decisions indicating that habeas corpus would be appropriate in such cases. Unfortunately, many lower state courts, whose decisions were not subject to review by the Illinois Supreme Court, continued to deny petitions for habeas on the old procedural grounds. On certiorari, the Supreme Court vacated the order of the state court denying the writ and remanded it for consideration in the light of the recent Illinois Supreme Court decisions. The State Attorney General had argued that the denial of habeas rested on an adequate nonfederal ground, but the Court refused to consider adequate a state procedure which denied consideration of denial of a federal right. The state must provide some procedure whereby a prisoner can raise his claims regarding denials of federal rights.

In the case before us, it is not argued that Arizona does not have any post-conviction procedures to consider claims of denials of federal constitutional rights. Furthermore, the direct order in Young was issued on direct review of the state court proceedings through certiorari, and not pursuant to a petition for habeas corpus.

The majority argues that the Arizona courts have not fulfilled the mandate of Young because they could not have considered petitioner's claims without reconstructing a transcript. What the majority fails to recognize is that Young does not disallow any state procedural ground which results in a refusal to consider constitutional claims, but only those which systematically and unwarrantedly exclude such consideration. No such contention is raised with respect to the Arizona courts here.

For these reasons, I would vacate the order of the district court and remand the case for an evidentiary hearing.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CHARLES E. HART, Petitioner, -vs- FRANK A. EYMAN, Warden, Arizona State Prison, Respondent.	Date June 8, 1970 NO. CIV 6921 PHX-CAM ORDER

The petitioner herein, in response to this Court's order of December 19, 1969, having moved for a delayed appeal in the state courts, or in the alternative, sought to obtain a hearing in the state courts in accordance with the procedure announced in Norvell v. Illinois, 373 U.S. 420, 83 S.Ct. 1366 (1963) or sought other appropriate relief; and the Arizona Supreme Court by order dated April 28, 1970 having summarily denied petitioner's motion without any hearing or findings; and petitioner having been denied his right of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in that he was granted no hearing of any kind but was dealt with summarily, 28 U.S.C. § 2243.

IT IS ORDERED that within 60 days from the date of this order, the state courts grant petitioner a delayed appeal or give him a Norvell v. Illinois, supra, hearing or set aside his conviction and retry him, or petitioner's writ of habeas corpus prayed for shall be granted and petitioner shall be released from custody.

/s/ C. A. Muecke
C.A. Muecke
United States District
Judge

Copy of the foregoing
mailed this 18th day of
June, 1970 to:

Fennemore Craig von Ammon
& Udall
Attorney General
Chief Justice Lockwood

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1412

~~STATE OF ARIZONA, ex rel.~~
GARY K. NELSON, ~~The Attorney General~~ FRANK EYMAN

Petitioner,

vs.

CHARLES E. HART,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

CALVIN H. UDALL
Fennemore, Craig, von Ammon & Udall
1700 First National Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003

PHILIP F. SCHNEIDER, JR.
Fennemore, Craig, von Ammon & Udall
1700 First National Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003

Attorneys for Respondent.

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CALVIN H. UDALL
Fennemore, Craig, von Ammon & Udall
1700 First National Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003

PHILIP F. SCHNEIDER, JR.
Fennemore, Craig, von Ammon & Udall
1700 First National Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003

Attorneys for Respondent

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